Supreme Court, U.S.
FILED
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No. 10-149

In The

Supreme Court of the United States

LEOPOLDO BAJALA,

Petitioner,

v.

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DID THE NINTH CIRCUIT DEPART FROM ESTABLISHED SUPREME COURT PRECEDENT WHEN IT HELD THAT CONVICTION UNDER CALIFORNIA LAW FOR "CULTIVATION OF MARIJUANA" IS CATEGORICALLY AN "AGGRAVATED FELONY" UNDER DRUG TRAFFICKING GROUNDS?

DID THE PLAIN LANGUAGE OF THE STATUTE CONTEMPLATE PERSONAL USE AND THUS RENDER THE STATUTE DIVISIBLE UNDER *Taylor v. United States*, 495 U.S. 575 (1990), AND THEREBY COMPEL THE NINTH CIRCUIT TO EMPLOY THE "MODIFIED CATEGORICAL APPROACH"?

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OPINION BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication. The decision is appended as Appendix 1.

JURISDICTION

The Ninth Circuit denied the Petition for Review and then entered an Order denying Petitioner's Motion for Re-Hearing on March 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 11101(a)(43)(B)

The term "aggravated felony" means

– illicit trafficking in controlled substances (as described in section 102 of the Controlled Substances Act) including a drug trafficking crime (as defined in section 924(c) of Title 1, United States Code).

INA § 240A

(a) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS – The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

1) has been an alien admitted for permanent residence for not less than five years;

2) has resided continually in the United States for 7 years after having been admitted in any status and

3) has not been convicted of an aggravated felony.

CALIFORNIA HEALTH AND SAFETY CODE § 11358

Every person who plants, cultivates, harvests, dries, or processes any marijuana, or any part hereof, except as otherwise provided by law shall be punished by imprisonment in the state prison.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Petitioner is a native and citizen of the Philippines who was granted Lawful Residency on October 9, 1983.

On December 6, 1999, he was convicted of a violation of Health and Safety Code § 11358 of the State of California.

He was apprehended at the Airport after a visit to his native Philippines and he was placed in Removal proceedings and charged as an alien who

has been convicted of a crime relating to a controlled substance under INA § 212(a)(2)(A)(i)(II).

The Government argued that the Petitioner is an aggravated felon and ineligible for relief and that a conviction for an aggravated felony precludes relief even if the alien is not so charged.

An aggravated felony is defined as "illicit trafficking in a controlled substance." (INA § 101(a)(43)(B)).

Under current law, the ameliorative section for Lawful Permanent Residents convicted of crimes is now found at section 240A.

The alien must have seven years of continuous residence and have been a Lawful Permanent Resident for at least five years; however, the applicant must "***not have been convicted of an aggravated felony.***"

The law is completely retroactive and applies to "convictions committed on, before and after" the effective date of the legislation.

On January 19, 2005, the Immigration Judge issued a written decision, agreeing with the Government and finding that the crime is indeed an aggravated felony and thus the Judge pretermitted the application for relief under INA § 240A(a). (See Appendix).

A timely appeal to the Board of Immigration Appeals ("BIA") followed and the BIA affirmed the decision of the Immigration Judge. (See Appendix).

A timely Petition for Review followed which was denied, relying on *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008). (See Appendix).

A Petition for Re-Hearing was then filed and denied on March 12, 2010. (See Appendix).

I. REASONS FOR GRANTING THE PETITION

A. THE COURT SHOULD ACCEPT CERTIORARI BECAUSE THIS IS AN IMPORTANT AREA OF LAW THAT IS SUSCEPTIBLE TO REPETITION; THE CALIFORNIA "CULTIVATION" STATUTE IS NOT AN AGGRAVATED FELONY BECAUSE THE NECESSARY COMPONENT OF TRAFFICKING IS MISSING FROM THE CALIFORNIA STATUTE AND THUS THE STATUTE IS "DIVISIBLE" UNDER SUPREME COURT LAW.

In *Taylor v. United States*, 495 U.S. 575, 602 (1990), the Supreme Court set forth the standard for admissible conviction documents where the statute, on its face, is inadequate and thus the categorical approach is inadequate.

This has been clarified and expanded in the Immigration context. *Leocal v. Ashcroft*, 543 U.S. 1

(2004); *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815 (2007).

The Petitioner was convicted of Health and Safety Code § 11358 which criminalizes the mere cultivation of, theoretically, a single marijuana plant without ***any intent to sell or distribute*** –

> "every person who plants, cultivates, harvests, dries or processes any part thereof. . . ."

It is also clear that the federal statute cited has ***no*** counterpart to the state statute.

21 U.S.C. § 841(a) – this is the all-encompassing drug trafficking statute – ***specifically requires the intent to sell or distribute*** –

"It shall be unlawful for any person to knowingly or intentionally

1) to manufacture, distribute, or dispense with intent to manufacture, distribute or dispense a controlled substance; or

2) to create, distribute, or dispense with intent to distribute or dispense, a controlled substance."

Next, a view of the language of this statute and an analysis of companion statutes reveals that the CA legislature intended the statute to contemplate cultivation for personal use and thus the conviction is clearly not categorically "trafficking."

California law specifically views this offense as a crime that ***can*** involve possession when one views this statute in conjunction with other provisions of the statute dealing with this offense.

California Health and Safety Code § 11358 is a qualifying offense for "Deferred Entry of Judgment" under Penal Code § 1000-1008.

Deferred Entry of Judgment or "Diversion" as it is colloquially known is a rehabilitative statue that allows the complaint to be dismissed provided the defendant complies with the terms of "Diversion."

It is thus very similar to the Federal First Offender Act. 18 U.S.C. § 3607

> The purpose of the deferred entry of judgment is to divert from the normal criminal process persons who are formally charged with ***first time possession*** of drugs, have not yet gone to trial but are found to be suitable to treatment and rehabilitation at the local level. *People v. Superior Court (On Ta Hai),* 11 Cal. 3d 59, 61 (1974).

It is thus clear that California law clearly contemplates that the crime can involve only personal use.

> This chapter shall apply whenever a case before any court upon an accusatory pleading for a violation of . . . Health and Safety Code 11358 if the marijuana planted, cultivated, dried or processed *is for personal use*. Penal Code 1000(a).

It is therefore clear that the California legislature clearly views this as a divisible statute in the sense that the offense involves personal use and arguably commercial use.

Where a statute is clearly divisible the "modified categorical approach" to deterring admissible conviction documents comes into play. *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001); *Jeune v. Attorney General of the United States*, 476 F.3d 199, 204 (3rd Cir. 2007); *Vargas-Sarmiento v. DOJ*, 448 F.3d 159 (2nd Cir. 2006).

In this calculus, in the context of a plea, a Court may consider the charging papers and a signed plea agreement; *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991); charging papers and transcript of a plea proceeding; *United States v. Bonat*, 106 F.3d 1472, 1476-1477 (9th Cir. 1997); charging papers and judgment on a guilty plea where the judgment shows that the defendant pled guilty for the reasons stated in the charging papers. *Bonat*, at 1477.

Here, the Government proffered the complaint and the minute order that reflected a conviction.

The compliant merely recites the precise language of this divisible statute.

The proffered conviction document was even less revelatory. It merely lists the Health and Safety Code section.

The rest of the material is purely extraneous, inadmissible law enforcement material.

The decision of the panel failed to address that this case is governed by circuit wide precedent and Supreme Court precedent.

CONCLUSION

Based on the foregoing, Petitioner would ask that certiorari be granted in this case.

Dated: June 8, 2010.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEOPOLDO BAJALA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 06-71049 Agency No. A038-461-235 MEMORANDUM* (Filed Dec. 7, 2009)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted November 17, 2009**

Before: ALARCÓN, TROTT, and TASHIMA, Circuit Judges.

Leopoldo Bajala, a native and citizen of the Philippines, petitions for review of the Board of Immigration Appeals' order dismissing his appeal from an immigration judge's removal order. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review de novo questions of law, *Altamirano v. Gonzales,* 427

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

F.3d 586, 591 (9th Cir. 2005), and we deny the petition for review.

Bajala's contention that his conviction under California Health & Safety Code § 11358 is not an aggravated felony is foreclosed by *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (per curiam). Accordingly, the agency properly concluded that Bajala was not eligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3).

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A38 461 235 – San Francisco Date: Jan. 26, 2006

In re: LEOPOLDO BAJALA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Frank P. Sprouls, Esquire

ON BEHALF OF DHS: Marci L. Ellsworth
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] – Controlled substance violation

Lodged: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude

Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] – Controlled substance trafficker

APPLICATION: Cancellation of removal pursuant to section 240A(a)

The respondent appeals from an Immigration Judge's February 4, 2005, decision finding him removable as charged and pretermitting his application for cancellation of removal under section 240A(a) of

the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), based on an aggravated felony conviction. We review *de novo* the question of whether a conviction for marijuana cultivation in violation of section 11358 of the California Health and Safety Code is an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). We conclude that it is, and the appeal will therefore be dismissed.

In addressing the question of whether the respondent's state felony conviction for cultivation of marijuana is to be considered as an aggravated felony, as an offense punishable under the Controlled Substances Act (CSA), we will apply the standard set forth in *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004). In that case, the Ninth Circuit determined that it would interpret "aggravated felony" differently in the immigration context than in the criminal sentencing enhancement context. The court held that "a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the CSA [Controlled Substances Act] or other federal drug laws named in the definition of 'drug trafficking crime,' [18 U.S.C. §924(c)(2)] or is a crime involving a trafficking element." In *Cazarez-Gutierrez*, the respondent was convicted under Ariz. Rev. Stat. §13-3407, of possession of methamphetamine, a felony under Arizona law for which he served two-and-a-half years in prison. The court found that this offense, although a felony under Arizona law, was neither a trafficking offense nor

punishable as a felony under the federal Controlled Substances Act (Act) or other federal drug laws. *Id.*

The 'trafficking offense' prong was treated as separate from the 'felony under the federal Controlled Substances Act' prong in *Cazarez-Gutierrez* and we will treat those prongs separately in the case now before us. We note that the term of art "drug trafficking crime" is distinct from the concept of a crime involving a trafficking element; "drug trafficking crimes" as defined in 18 U.S.C. § 924(c)(2) include "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). No connection to trafficking is necessary to meet the definition of an aggravated felony. *Cazarez-Gutierrez*, *supra*, at 919. Cultivation of marijuana is punishable under the Controlled Substances Act. *See* 21 U.S.C. §§ 812(c) (categorizing marijuana as a controlled substance), 841(a)(1) (proscribing "manufacture [of] . . . a controlled substance"), 802(15) (defining "manufacture" as production), 802(22) (defining "production" as "planting, cultivation, growing or harvesting"). Further, it is punishable as a felony under the Controlled Substances Act. *See* 18 U.S.C. § 3559(a) (defining a felony as any crime for which the maximum term of imprisonment authorized is more than one year); 21 U.S.C. § 841(b)(1)(D) (authorizing up to five years imprisonment for cultivation of marijuana).

Cultivation of marijuana differs from possession of metamphetamine in violation of Ariz. Rev. Stat. § 13-3407 on the central issue of whether the state

felony offense would also be a felony under the Controlled Substances Act. *See* 21 U.S.C. § 841(b)(1)(D); *cf. Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (finding that conviction for possession of methamphetamine under CHSC §11377(a) (1998), although prohibited under the CSA, would not be punishable as a felony under the federal Controlled Substances Act (CSA) or other federal drug laws as referred to in 18 U.S.C. § 924(c)(2)).

The provision under which the respondent was convicted cannot be construed to include simple possession offenses as well as cultivation offenses, The language of section 11358 of the California Health and Safety Code does not contain any words signifying a simple possession offense. The provision refers to "every person who plants, cultivates, harvests, dries or processes any marijuana or any part thereof" and does not apply to an individual who simply possesses marijuana.

For the foregoing reasons, we find that the respondent has been convicted of an aggravated felony. Consequently, we see no basis on which to sustain his appeal.

ORDER: The respondent's appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File A 38 461 235 February 4, 2005

In the Matter of

LEOPOLDO BAJALA,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGES: Section 212(a)(2)(A)(i)(II), violation of a law relating to a controlled substance; Section 212(a)(2)(A)(i)(I), an alien convicted of a crime involving moral turpitude; Section 212(a)(2)(C)(i) of the Immigration and Nationality Act, an alien who the Attorney General has reason to believe is an illicit trafficker of a controlled substance or a knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking in such controlled substance or listed substance or chemical.

APPLICATION: Cancellation of removal for lawful permanent resident aliens, pursuant to Section 240A(a) of the Immigration and Nationality Act.

ON BEHALF OF THE RESPONDENT:

John Ricci, Esquire
Ricci & Sprouls
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94111

ON BEHALF OF THE DEPARTMENT:

Marci C. Ellsworth,
Esquire
Assistant Chief Counsel
San Francisco, California
94108

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of the Philippines who immigrated to the United States as a lawful, permanent resident on or about October 9, 1983. Since that time, he has resided in the United States to the best of the Court's knowledge.

The respondent was charged as an arriving alien and served with a Notice to Appear dated November 20, 2003, (Exhibit 1) in which he has been charged as a person who had been convicted of a crime relating to a controlled substance.

Subsequent to the original charging document the respondent was served with a additional charge of inadmissibility or deportability, on Form I-261 (Exhibit 2). On that, he was charged with three additional factual allegations and two additional charges of removability, specifically Section 212(a)(2)(A)(i)(I), conviction of crimes involving moral turpitude and Section 212(a)(2)(C)(i) of the Immigration and Nationality Act, an alien who the Attorney General has reason to believe is an illicit trafficker in a controlled substance.

The respondent pled before this Court and denied factual allegation 4, on Exhibit 1, and factual allegations 8, 9, and 10, on Exhibit 2. He also denied any of the bases on which he is placed in removal proceedings that is the three charges.

Respondent's counsel has argued that respondent should be eligible to apply for a waiver as a permanent resident on the basis that the charge at factual allegation number 4 is not deemed to be an aggregated felony. The arguments are that the planting or cultivating of marijuana hash is not considered a drug trafficking crime. The Government responded and filed a brief contained in the record, at Exhibit 5, and respondent filed a subsequent brief, arguing that this is not a crime that involved an intent to sell or distribute (Exhibit 6).

After the Court's analysis of the law, it made a written decision, on January 19, 2005, using analysis that was laid out in the Ninth Circuit case of *United States v. Zarate-Martinez,* 133 F. 3rd 1194 (9th Cir. 1998) overruled on other grounds. It was an analysis of what it meant to the cultivation of marijuana as punishable under the Controlled Substances Act and is laid out in that written decision.

Because the Court believes that this charge for which there is evidence that the respondent was convicted of based upon Exhibit 3, the respondent would be found to be removable as a person who had been convicted of a law relating to a controlled

substance and the analysis used indicates that this would be a aggregated felony crime.

The respondent was also charged with having been convicted of crimes involving moral turpitude and Exhibit 3 also establishes those crimes which are alleged in factual allegations 8, 9, and 10. And the Court found that he was removable under 212(a)(2)(A)(i)(I) of the Act.

The respondent finally was charged, under Section 212(a)(2)(C)(i). And the Court makes no finding with regard to his ineligibility under that Section, because it is not crucial that he be found removable under that charge, at least in the analysis that the Court has used.

Since the respondent is a trafficker, he is ineligible for having been convicted of an aggravated felony, since persons who have been convicted of aggravated felonies are not eligible to seek relief under cancellation of removal, pursuant to Section 240A(a) of the Act. The Court has therefore pretermitted his application for cancellation of removal and will order him removed from the United States to the Philippines on the charges contained in the Notice to Appear, the two charges which have been sustained, that is.

Accordingly, the order is as follows:

ORDER

IT IS ORDERED that respondent's application for cancellation of removal for certain permanent resident aliens, under Section 240A(a), is pretermitted for failure to establish that he is statutorily eligible.

IT IS FURTHER ORDERED that respondent be removed from the United States to the Philippines on the two charges.

BETTE KANE STOCKTON
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEOPOLDO BAJALA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 06-71049 Agency No. A038-461-235 ORDER (Filed Mar. 12, 2010)

Before: ALARCÓN, TROTT and TASHIMA, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Bajala's petition for rehearing en banc is denied.